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CHARLES ELMORE CR

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No. 520

Supreme Court of the United States

OCTOBER TERM, 1943.

IRWIN UNGER,

Petitioner,

vs.

THE OHIO STATE DENTAL BOARD,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRELIMINARY STATEMENT.

The Ohio State Dental Board was heretofore created by legislation enacted by the General Assembly of the state of Ohio and vested with power to regulate and supervise the practice of dentistry in this state. In the exercise of this authority it heretofore revoked the right

of petitioner to engage in the practice of dentistry following the hearing of certain charges theretofore filed against him. The charges pertained to his use of a dental laboratory as advertising solicitors or publicity agents.

The statutory enactment under which respondent proceeded was Section 1325, General Code of Ohio, which is set forth in full at page 9 of the petition for writ of certiorari.

The action of the Ohio State Dental Board in revoking petitioner's license was sustained by the Court of Common Pleas when it came on for a **de novo** trial in that court. Thereafter an appeal was perfected to the Court of Appeals which affirmed the judgment of the lower court. Thereupon petitioner filed an application in the Supreme Court of Ohio to certify the case for hearing which was granted. The case was thereafter heard in that court on its merits. This court affirmed the action of the Court of Appeals, two of the seven judges thereof dissenting and one judge not participating.

Petitioner now seeks to have this court review the action of the Supreme Court of Ohio.

JURISDICTION OF THIS COURT.

Petitioner seeks to invoke the jurisdiction of this court by virtue of Title XXVIII, U. S. C., Section 344 (b). No treaty or statute of the United States is involved and therefore the sole question that seemingly can be raised is whether or not there is drawn in question the validity of a state statute (Section 1325, *supra*) that is repugnant to the Constitution of the United States.

**NO FEDERAL QUESTION PRESENTED BY
RECORD.**

One of petitioner's arguments is that the Ohio State Dental Board deprived him of his right to practice dentistry without due process of law. This is the only conceivable federal question that can be involved.

Reference to page 124 of the transcript of the record will disclose that petitioner urged seven assignments of error in the Court of Appeals. Since the Supreme Court of this state will not weigh the evidence, one of the assignments of error was omitted in that court. With that exception the same assignments of error were claimed therein as had been urged in said Court of Appeals.

In none of these assignments of error was it claimed that Section 1325, supra, is unconstitutional. Nor is it urged that there was an unconstitutional exercise of authority thereunder. We therefore submit that petitioner now seeks to present a federal question which was not raised below, nor passed upon by any court. Precisely how he is able to now raise that question is not explained.

CONTENTIONS OF PETITIONER.

Short work can be made of the contentions which are raised by petitioner.

Petitioner grounds his right to have this court review the decision of the Supreme Court of Ohio because of the principles announced in the case of *Tumey v. State*, 273 U. S., 510. He endeavors to draw an analogy between the facts in that case and the proceedings that occurred before the Ohio State Dental Board. In the **Tumey** case it was held in substance that an accused is unconstitutionally deprived of due process if the court which hears the matter has a substantial pecuniary interest in reaching a conclusion against him. In the instant case it is urged that because one of the members of the Ohio State Dental Board paid money to a witness who appeared before the board, the said board was apparently without authority to pass upon the charges. The record discloses that the witness in question went to some trouble in obtaining the evidence which he presented before the board and it was for his time and trouble that he was compensated. The member of the board in question derived no financial gain from the transaction. In fact he sustained a pecuniary loss rather than a gain. Precisely, therefore, how the **Tumey** case bears any analogy to the matter here being considered is not plain.

Among other reasons petitioner urges that this court should grant the petition for writ of certiorari for the reason that the case below was tried on the theory of a conspiracy and that hearsay evidence was admitted over

petitioner's objection. Neither of these matters involve a federal question. We are at a loss, therefore, to understand how such reasons can be assigned as the basis for this court entertaining jurisdiction.

LAW AND ARGUMENT.

This court has held in *Zucht v. King*, 260 U. S., 174, that it will decline jurisdiction, although the constitutionality of a state law is drawn in question, when it appears that the constitutional question presented is not substantial in character. In that case the court pointed out the validity of the ordinances under consideration was drawn in question by objections properly taken below. Such is not the situation here with respect to the statutes of Ohio. But even assuming that petitioner had taken the proper action to preserve the federal question, the **Zucht** case has particular application to the matter here under consideration.

Attention might also be called to *Semler v. Oregon State Board of Dental Examiners*, 294 U. S., 608, wherein it was held that a state may regulate the practice of dentistry and that the obligation of contracts is not unconstitutionally impaired where interference with their performance is a result of a proper exercise of the police power. See also *Toole v. Michigan State Board of Dentistry*, 316 U. S., 647, wherein a motion to dismiss was granted for want of a substantial federal question on the authority of the **Semler** case.

An examination of the several decisions of this court that are cited by petitioner discloses that none of them

has particular application to the matter here to be determined. They deal essentially with the admission of hearsay evidence in criminal cases. Petitioner apparently forgets the fact that this was a hearing before an administrative board and that the rule with respect to the admissibility of evidence is not drawn with the same degree of fineness as it is in hearings before courts. See *Meffert v. Packer*, affirmed by this court without opinion November 14, 1904, 195 U. S., 350.

CONCLUSION.

It is respectfully submitted that petitioner has not demonstrated why this court should entertain jurisdiction. Consequently the petition should be denied.

Respectfully submitted,
THOMAS J. HERBERT,
Attorney General of Ohio,
Attorney for Respondent.

